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Supreme Court of the United States

October Term, 1978

No. 78-1818

FORD MOTOR COMPANY
Petitioner,

v.

COLONIAL FORD, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Colonial Ford, Inc. ("Colonial") files this brief in opposition to the petition for certiorari of Ford Motor Company ("Ford") seeking to overturn a jury verdict on the ground the evidence was insufficient to support the jury's determination that Ford had violated the Automobile Dealers Day In Court Act ("ADDICA"). The Tenth Circuit rejected Ford's claim of evidentiary insufficiency and found Ford's coercive conduct had

"permeated the entire relationship" between Ford and Colonial.

QUESTIONS PRESENTED

1. Whether Ford's deprivation of Colonial's right to run its own business and to control critical aspects of its business including its management, facilities, and financing through a continual course of conduct in the context of the termination and threat of termination of Colonial's Ford franchise constituted a sufficient evidentiary foundation for the jury's determination that Ford had violated ADDICA, 15 U.S.C. §1222.

2. Whether Ford can change its story from the trial when it categorically denied having anything to do with changes in Colonial's management and ownership and now claim for the purpose of seeking review in this Court it was justified in requiring such changes.

3. Whether evidence Ford forced Colonial to relocate and build a new uneconomic facility, the location, size and consequent cost of which Ford determined, in disregard of Colonial's financial capability and legitimate financial interest can constitute a component element of a continuing course of coercive conduct by Ford in violation of ADDICA, 15 U.S.C. § 1222.

STATEMENT OF THE CASE

1. *The questions Ford claims are presented are not presented by the evidence.* Ford fundamentally misstates the evidence contained in over 2,500 pages of trial testimony and 200 trial exhibits that supports the

jury's verdict that Ford violated ADDICA. Ford not only has failed to fairly summarize that evidence, but attempts to present questions for review by this Court that are in conflict with and not supported by that evidence.

Ford claims one of the two questions presented for review is whether ADDICA prohibits Ford from requiring qualified and experienced management as a condition to granting a Ford franchise. (Ford Pet. for Cert. at 2.) At trial, however, Ford falsely but categorically denied doing anything with regard to changing Colonial's management or ownership so as to now preclude Ford from claiming its conduct with regard to Colonial's management and ownership was justified.

Colonial's evidence was that Ford through Ford's District Manager, Mr. Parr, under the threat of refusing to reinstate Colonial's Ford franchise, required Colonial to give up control of Colonial's dealership to a Mr. Pease and required Colonial's president and sole stockholder, LeGrande Belnap, to sell Mr. Pease a 49% interest in Colonial without Mr. Pease having to pay anything. (179-89, 393-97, 399-400, 402-04; PX-4, PX-49.)[1] Colonial's evidence was that Mr. Parr demanded Colonial relinquish "sole and absolute control" of the dealership to Mr. Pease under the threat of refusing to reinstate Colonial's Ford franchise. (182.) Mr. Parr dictated the terms of the contract granting

[1] Page citations are to the Joint Appendix filed in the United States Court of Appeals for the Tenth Circuit. Citations to exhibits are to the exhibit numbers used in the United States District Court, reprinted in volumes 7, 8 & 9 of the Joint Appendix; plaintiff's exhibits are marked PX- ; Ford Motor's exhibits are marked DX- ; and Ford Credit's exhibits are marked DCX- .

Mr. Pease control and selling him an interest in the dealership (180-85, 393-96, 399-400, 402.), and that contract was signed on the date the contract bears, July 29, 1969 (PX-4.), in Mr. Parr's office at Mr. Parr's insistence. (402-03, 179-89.) Colonial's evidence was offered through the testimony of Mr. Belnap and Mr. Summerhays, a lawyer who represented Mr. Belnap in these transactions (178-89, 393-96, 399-400, 402-04; PX-4.), and was corroborated by Mr. Summerhays' business calendar which under the date of July 29, 1969, the date of the Pease-Belnap contract, contained the notation "Colonial Ford review of Pease-Belnap contract—at Parr's office 3 hours." (PX-49.)

Ford at trial did not attempt to justify placing Mr. Pease in charge of the dealership or requiring Mr. Belnap to grant Mr. Pease a buy-in in the dealership. Ford categorically denied having anything to do with requiring Colonial to relinquish control of the dealership to Mr. Pease or requiring Mr. Pease be given a 49% buy-in in Colonial. Mr. Parr was the only witness who testified for Ford with regard to the Pease-Belnap transactions. Mr. Parr denied having anything to do with the Pease-Belnap transaction. (320-34.) He denied suggesting to Mr. Belnap that Mr. Pease be given a buy-in in Colonial. (329-31.) He categorically denied that he did anything to deprive Colonial of the control of its management or dealership. (329-34.) He went further. Mr. Parr testified:

> Q: Did you recommend to Mr. Belnap that Mr. Pease be given the charge of operating the franchise?

A: No.

Q: I am using the word "recommend."

A: I understood.

Q: Suggest?

A: No.

Q: Advise?

A: No.

Q: Hint?

A: No.

Q: Indicate?

A: No. (330-31.)

Mr. Parr denied Mr. Belnap and Mr. Summerhays met with him at his office on July 29 (333-34.), and even denied under oath he had ever seen the Pease-Belnap contract prior to the filing of Colonial's complaint. (332-37.)

The dispute between Colonial's evidence and Mr. Parr's testimony presented a question of fact for the jury to resolve and the jury resolved it against Ford, but Ford's evidence did more than that. Ford cannot have it both ways. It cannot totally deny doing something at trial, and then claim on appeal that it did it, but what it did was justified. A manufacturer cannot falsely deny engaging in conduct and then when that doesn't work claim while it engaged in that conduct what it did was necessary to protect its legitimate business interest. The question, therefore, that Ford claims

is presented with regard to Colonial's management is precluded by Ford's own testimony at trial.

The other question Ford claims is presented is whether ADDICA prohibits Ford from requiring a dealer to keep its commitment to provide adequate dealership facilities. (Ford Pet. for Cert. at 2.) But that question is not presented by the evidence. The jury, indeed, was specifically instructed that Ford may under ADDICA "require" its dealer to provide adequate facilities. (993-95.) The evidence was not that Ford required Colonial to provide adequate facilities, but uneconomic facilities. The evidence was Ford forced Colonial to relocate and build an uneconomic facility, the location, size and consequent cost of which Ford determined regardless of Colonial's financial interest. (214-16, 221-22, 224-25, 429, 432-35, 541, 616-17, 1647; PX-10, PX-44, PX-87.) Ford forced Colonial to buy a site for a new dealership facility that cost Colonial $70-80,000.00 an acre. (201-07.) Ford rejected a site Colonial proposed that would have cost Colonial $18-20,000.00 per acre, and was subsequently acquired by the leading Chevrolet dealer in Metropolitan Salt Lake. (201-02.) Ford even rejected a site within 200 feet of the site it made Colonial acquire that Colonial could have acquired at a price of $20,000.00 per acre. (203-04.) Once Ford had forced Mr. Belnap to acquire a new location for Colonial (214-16; PX-10.), Ford and not Colonial determined the size and consequent cost of Colonial's new facility. (224-25.) Mr. Belnap was not even consulted. (224-25, 429; PX-44, PX-87.) Under Ford's normal procedures Ford conducts a feasibility study with regard to any

new dealership facility to determine whether the new project is a good thing for the dealership. (432.) Contrary to its own procedures Ford did not conduct any feasibility study to determine whether Colonial could profitably operate its dealership from the million dollar facility that Ford required Colonial to relocate and construct. (432-35, 531, 616-17; PX-13, PX-14, PX-15.) Ford failed to conduct a feasibility study under its normal procedures even though two of the five Ford dealers in Metropolitan Salt Lake had recently constructed new facilities and had experienced substantial economic difficulty after moving into those facilities.[2] (430-31.) The adverse impact of Colonial's new facility on Colonial's liquidity and profitability was admitted by Ford. (PX-50.), and is dramatically portrayed in the increased cost of the new facility in terms of Colonial's new car sales. In 1973 before Colonial moved into its new facility, its facilities cost per new unit sold was $42 per unit. (PX-75.) In 1974 its facility cost per new vehicle sold, even with an increase in sales, was $118 per unit or an increase of over 150%. (PX-75.)

Ford at the trial did not attempt to defend Ford's requirements for Colonial's new facilities as necessary or adequate for Colonial's dealership. On the contrary the Ford employee, Mr. Goedde, who in fact approved Colonial's plans for its new facility and thereby its consequent size and cost (429; PX-44, PX-53, PX-84.) simply denied doing that. Mr. Goedde denied Ford

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[2] The question of whether the new facility was economically feasible for Colonial was never even discussed with Mr. Belnap. (221-22.)

required Colonial to construct facilities that were substantially in accordance with Ford's requirements. (665.) He even denied that Ford approved the plans for Colonial's new facility. (667-68.) He insisted on his denial even though he wrote a letter saying Ford was required to approve Colonial's facility plans. (PX-87.) When Mr. Goedde's letter was called to his attention on cross-examination he testified:

> Q: So that we just ought to erase that language from the letter. You didn't mean what you said?
>
> A: In terms of that particular line, that is correct. (670-71.)

The evidence thus, presented a question of fact for the jury as to whether Ford had required Colonial to build a new uneconomic facility, the size and consequent cost of which Ford determined without regard to Colonial's financial interest. But the evidence did more than present a jury question. How can Ford now claim the question presented for this Court is whether ADDICA prohibits an automobile manufacturer from requiring that a dealer provide adequate dealership facilities when at trial Ford denied imposing any requirements with regard to Colonial's new facilities.

Ford again cannot deny doing it at trial and then on appeal claim the question presented was whether what it did was necessary to protect its legitimate interest as an automobile manufacturer.

2. *The evidence, as the Tenth Circuit twice concluded, was not only sufficient but overwhelming that Ford violated ADDICA.* Colonial's practical predecessor in interest, and indeed, the assignor of Colonial's original Ford franchise was Petty Ford, Inc. (197, 341-42; PX-5, PX-42.) Petty Ford, Inc. was originally owned by the Petty family and under the control of a Neuman Petty. (144.) Mr. Petty's personal problems in 1965 resulted in the Petty family bringing in a son-in-law, Mr. Belnap, to serve as the nominal dealer for the dealership. (145.) Mr. Petty's problems persisted and over the next three to four years Mr. Belnap's responsibility in the dealership increased, and contrary to Ford's claim (Ford's Pet. for Cert. at 6-7.) by the end of 1968 Mr. Belnap had assumed full managerial control and had acquired a 51% interest in the dealership. (146; DX-84.) Although Mr. Belnap had managerial control there were disputes between the Petty family and Mr. Belnap over their ownership interest, and this internal dispute concerned Ford. (PX-1.) Ford told Mr. Belnap if the dispute in ownership was not resolved, Ford would terminate Petty Ford's franchise. (159.) These disputes were not resolved. Ford issued a notice to terminate Petty Ford, Inc.'s franchise on May 15, 1969. (161; PX-2.)

A. *Ford's Plan to Coerce Colonial.* Upon receipt of Ford's notice of termination Mr. Belnap filed an appeal with Ford's Dealer Policy Board to rescind the termination, and a hearing was set with that Board for July 1, 1969. (161-62.) Before the hearing Mr. Belnap met with Mr. Parr to discuss what

Ford wanted to rescind the franchise termination. (164-65.) Mr. Parr told Mr. Belnap Ford wanted to have the notice of termination rescinded and the dealership continued provided Ford's conditions were met. (165-66, 170, 387-88.)

During May and June of 1969 Mr. Parr met with Mr. Belnap and his attorney, Mr. Summerhays, and told them what Ford required to rescind the termination. (170, 172-73, 387-90.) Contrary to Ford's claim Mr. Parr and Mr. Belnap did not mutually devise a plan for continued Ford representation. (Ford's Pet. for Cert. at 8.) Mr. Parr, with the sanction of termination hanging over the franchise, told Mr. Belnap Ford would require five conditions for reinstatement. (165-69, 170, 387-90.) Mr. Parr insisted that Petty Ford, Inc., be reorganized so that only one corporation had an interest in the dealership and Mr. Belnap acquire ownership of that corporation from the Petty family. (167, DX-24.) Ford demanded that the dealership be recapitalized through the infusion of a substantial amount of new capital. (165; DX-24.) The conditions of reorganization and recapitalization were to be met before Mr. Belnap's hearing with the Dealer Policy Board. *Id.* Ford also demanded the dealership relinquish its heavy duty truck franchise (167-68.), the dealership relocate (386-87; DX-24.), and finally Mr. Pease be given a buy-in in the dealership. (166-67, 388, DX-24.) Mr. Parr mentioned, in the May and June meetings, giving Mr. Pease full control of the dealership, but when Belnap vigorously objected, the issue was dropped. (168-69.) Mr. Parr told Mr. Belnap if the five conditions were satisfied there would be no question about the

reinstatement of the franchise (166, 390.), and Mr. Parr also demanded the dealership's name be changed to Colonial Ford, Inc. (DX-24.)

Prior to July 1, Mr. Belnap resolved his disputes with the Pettys, acquired their interest, and invested new capital in the dealership. Mr. Belnap's total investment in the dealership after these transactions was $460,000.00. (170-72, 572, PX-3, 90.) Ford's statement that Mr. Belnap purchased only 51% of the dealership is false. He purchased the entire interest in the dealership. (170-72, 572; DX-84, PX-90.) Mr. Belnap's substantial investment in the dealership without reinstatement of the franchise was a substantial risk, but he did so in order to comply with Ford's demands. (166, 177.)

On July 1, Mr. Belnap and Mr. Summerhays met with Ford's Dealer Policy Board and told the Board that Ford's two conditions of reorganization and recapitalization had been accomplished. (174.) He also told the Board he would relocate the dealership eventually *if he could do so economically* (174, 389, 391-92.); he would temporarily relinquish the heavy duty truck franchise (391.); and he would consider giving Mr. Pease or another general manager a buy-in. (174, 389, 391-92.) Nothing was said about giving Mr. Pease control of the dealership. The Dealer Policy Board told Mr. Belnap they would take the matter under advisement. (178.) In fact, the Dealer Policy Board decided to defer any action until Mr. Belnap had complied with all of Ford's conditions. (PX-39, PX-42.)

B. *Ford coerced Colonial to relinquish control of its dealership to Mr. Pease.* Mr. Parr proceeded to implement Ford's plan. Between July 1 and July 29, Ford required Mr. Belnap to give up control of the dealership to Mr. Pease and give Mr. Pease a buy-in in the dealership. (179-89, 393-99, 402-04.) Mr. Parr met with Mr. Belnap after Mr. Belnap's return from Dearborn on July 9. (179.) Mr. Parr told Mr. Belnap Ford insisted Mr. Pease be given "a 49% buy-in and control of the dealership or there would be no reinstatement of the franchise." (180.) Mr. Belnap was stunned. *Id.* He called Mr. Summerhays and asked him to join the meeting. (181.) Mr. Summerhays came and Mr. Parr repeated his demands. (181-83, 393-95, 397-98.) Mr. Summerhays told Mr. Parr that faced with Ford's ultimatum Mr. Belnap didn't need a lawyer, but a secretary. (183, 394-95.) But Mr. Parr persisted and dictated the terms of a contract between Mr. Belnap and Mr. Pease. (184-85.) On July 29, Mr. Belnap yielded to Ford's ultimatum and executed a written agreement giving Mr. Pease control of the dealership and a 49% buy-in. (184-85, 402-03; PX-4.) The agreement provided "Marshall Pease shall be in charge of operating the franchise dealership. . . ." (PX-4.) Contrary to Ford (Ford Pet. for Cert. at n. 7.), this contractual provision which Mr. Parr dictated was intended to give Mr. Pease full control of the dealership and eliminate Mr. Belnap's authority. (182, 184-85, 187-88, 397-99, 402.)

Mr. Pease under the Pease-Belnap contract, which Ford and not Mr. Pease negotiated (401-02.), purchased a 49% interest in the dealership that Mr. Bel-

nap had paid over $460,000.00 for, for nothing. (171-72, 723-24; PX-4, PX-90.) Mr. Pease agreed to pay $20,000.00 for his interest in the dealership with the remainder of the purchase price to be paid out of the dealership profits. (PX-4.) Mr. Pease in fact immediately withdrew the $20,000.00. (193-94.)

Mr. Belnap only signed the agreement to avoid bankruptcy because Mr. Parr had told him "if he didn't give Mr. Pease absolute control of this dealership, there would be no reinstatement of the franchise." (185-86.) After Mr. Belnap capitulated and signed the Pease-Belnap contract Mr. Pease and not Mr. Belnap controlled Colonial Ford (194-96.), and Ford dealt exclusively with Mr. Pease (222-23, 231, 233-34.), except for the acquisition of a new location. (200-01.) Ford turned to Mr. Belnap on the issue of relocation "because Mr. Pease didn't have any money", and Ford required Mr. Belnap to furnish the necessary capital. *Id.*

C. *Colonial was not a prospective dealer and Ford's coercive conditions for the reinstatement of Colonial's franchise were not pre-franchise conditions.* Contrary to Ford's repeated claims, Colonial was not a prospective dealer and Ford's coercive conditions for the reinstatement of Colonial's franchise were not pre-franchise conditions. (Ford's Pet. for Cert. at 2-3, 8-9.) After Mr. Belnap capitulated to Ford's demands to relinquish control of the dealership, the Petty Ford franchise was assigned to Colonial on a standard Ford form. (341; PX-5.) Ford required the assignment and approved it (197, 341-42; PX-5, PX-42.), and Ford

reinstated Colonial's franchise. (338-39, 341; PX-5 PX-42.) Ford's own documents and Mr. Parr himself confirmed that the Petty Ford franchise had been assigned to Colonial and reinstated. (338-42; PX-5, PX-42.) Colonial was not only technically the successor to the Petty Ford franchise, it was also practically the successor. Ford required that Petty Ford be reorganized as a condition for reinstatement, it suggested the name Colonial (DX-24.), and the Ford conditions for reinstatement were intended to be imposed and were imposed upon Colonial.

After Colonial's franchise was reinstated (338-39, 341; PX-5.), Ford issued Colonial a new franchise because Ford wanted Colonial to have a franchise for a limited term. (338-39; PX-42.) The Petty Ford franchise that had been assigned and reinstated in August of 1969, was Ford's standard "continual franchise." (197, 338-39, 341-42; PX-5, PX-42.) Since Colonial, however, had not complied with Ford's condition of relocation, Ford in September of 1969 issued Colonial another franchise that was limited to a two-year term so as to guarantee Colonial's relocation. (199-201, 339; PX-5, PX-6, PX-42.)

D. *Ford forced Colonial to relocate and transfer all of its financing to Ford Credit.* By September 1969 Colonial, except for relocation, had complied with all of Ford's conditions for reinstatement including the relinquishment of its heavy duty truck franchise. (189-92, 338-39; DX-27, DX-47.) Colonial never entered into any contractual agreement with Ford to relocate and only committed to relocate because Ford gave it

no choice. (199-201, 338-39; PX-6.) Colonial did not relocate during the two-year term of its franchise because Ford would not approve the sites Colonial proposed. (201-07; PX-7.) When Colonial had not relocated by September 1, 1971, Ford issued Colonial a new franchise for a one-year term and told Colonial, that was it, it would relocate by the end of that year or lose its franchise. (206-07; PX-8.)

In late 1971 Ford attempted to get Colonial to purchase its present site at a cost of $70-80,000.00 per acre. (205-09.) Mr. Belnap was reluctant to acquire this site because he believed it was too expensive. (207-09; PX-7.) In the spring of 1972 Ford's regional manager, Mr. Yando, came to Salt Lake to inspect the proposed site. (207-08.) Mr. Belnap again expressed his concern about the site's cost. (207-09.) Mr. Yando responded by telling Mr. Parr to "get Mr. Belnap with Ford Credit . . ." (207.), Ford's wholly-owned financing subsidiary. Mr. Belnap was reluctant to finance with Ford Credit because he had "heard stories about being locked in completely with Ford Credit." (210.)

Mr. Belnap's fears were justified. When Ford Credit contacted Mr. Belnap, Ford Credit told Mr. Belnap that it would only consider providing a capital loan for Colonial to build a new facility and keep its franchise if Colonial terminated its existing financing relationships with local banks and placed all of its wholesale flooring and retail contracts with Ford Credit. (210; PX-20.) Belnap again objected and took the issue back to Mr. Parr. Mr. Parr in one of his more quot-

able epigrams said "[W]ell if you have to do it, give it to them. It's all in the Ford family." (212.)

Mr. Belnap continued to resist and on June 2, Mr. Parr personally came to Colonial's office and delivered a notice of termination of Colonial's one-year term franchise and issued Colonial a three-month franchise expiring September 15, 1972. (PX-10.) Mr. Parr made the message clear; he told Mr. Belnap that if Colonial didn't have a new location and building commitments by September, Ford would terminate the franchise. (214.)[3] At this point Mr. Belnap's investment in Colonial was over $600,000.00 and he had no choice. (215-16.) Mr. Belnap capitulated and committed to Ford Credit on June 16, 1972. (215-16; PX-11, PX-12, PX-13, PX-14, PX-15.) Colonial was required to place its wholesale flooring with Ford Credit, and under the express terms of its capital loan agreement was required to place all of its retail contracts with Ford Credit. (PX-12, PX-20 at ¶4.9.) The agreements between Colonial, Ford and Ford Credit further gave Ford the unconditional right to occupy the new facilities, "if, for any reason, Colonial Ford, Inc. should cease to be a Ford dealer at the proposed location." (228-29, 433-34; PX-19.)

Colonial paid a heavy price in independence to stay in business. Ford deprived Colonial of the management and control of its business, required Colonial to relocate and build costly new facilities when far less expensive alternatives were available, and required Col-

[3] Ford in its petition does not even mention the three-month franchise or Mr. Parr's ultimatum.

onial to sever its historic banking and financing relationships and finance its capital, wholesale, and retail financing requirements with Ford Credit

E. *Ford's coercion caused Colonial's liquidity and working capital problems.* Ford, after Colonial relocated, continued to build Colonial as a volume dealership in disregard of Colonial's financial interest. Ford in the first few months after Colonial moved to its new facility increased Colonial's planning volume by 30%. (434; PX-22.) Planning volume is a key planning figure for Ford. (435.) Planning volume represents the number of new vehicles Ford estimates a dealer should sell, and Ford's requirements for a dealer's inventory and working capital are based on the dealer's assigned planning volume. (232, 435, 438-40, 1648-49.) When Ford increased Colonial's planning volume, Ford anticipated under its own internal analysis that Colonial's inventory and working capital requirements would increase. (437-38.) Ford, however, did not inform Mr. Belnap that the dealership's planning volume had increased or that the increase would require additional working capital. (212-13, 231-32, 235, 436, 441-42.) Under Colonial's planning volume, Ford increased Colonial's new car inventories so that in the first seven months of 1974 Colonial's average new units in inventory increased by 100 per month. (440-41, 505-06.) The build up in Colonial's new car inventories was financed by Ford Credit allowing Colonial to run over the limits of its authorized flooring line in an amount of up to $1 Million (233, 497-98; PX-72.), and was, of course, directly a function of inadequate management control.

Prior to Colonial's move to its new facility, Colonial had not experienced any liquidity or working capital problems. (365-67, 441-42, 497; PX-3.) This situation changed after Colonial moved. Ford itself analyzed the cause of Colonial's liquidity problem. (443; PX-50.) Ford, in August of 1974, found the cause of Colonial's liquidity problem was directly attributable to the critical areas of Colonial's business in which Ford had deprived Colonial of the right to run its own business—that is, its management, facilities, and financing. (PX-58.) Ford found that the cause of Colonial's liquidity problem was in two basic categories of expense, new facility expense and wholesale flooring expense. (PX-50.) Colonial's cost in the first seven months of 1974 for these two categories of expense increased over the same period in 1973 by $140,000.00. (433; PX-50.)

Colonial met its liquidity problem by floating against Ford Credit. (PX-62, PX-63, PX-64.) Floating occurs when a dealer sells a new car and rather than paying off its wholesale financing obligation uses the cash in its business until the lender conducts a wholesale audit and demands payment. Ford Credit was well aware Colonial was floating and using the float to operate its dealership. (499-501, 881-82; PX-62, PX-63, PX-64.) Ford Credit allowed Colonial to float to finance its dealership by conducting infrequent wholesale audits. (879-80.) Thus, even though Ford Credit was fully aware that Colonial was floating, it only conducted three wholesale audits in the first seven months of 1974. (879-80.)

Ford Credit expressed no concern about Colonial

floating to finance its liquidity (PX-64.), and just as Mr. Belnap had not been advised about the increase in Colonial's planning volume, (233, 436, 441-42.), he was not advised that Colonial's new car inventory was overline, that Colonial's working capital was inadequate or that it was floating against Ford Credit. (233-35, 95, 441-42, 446-47.) Indeed, on July 30 in an internal memorandum, Ford Credit recommended that Colonial's new car flooring line be increased from $1.2 Million to $1.7 Million and concluded that Colonial "all in all . . . [had] . . . done a respectable job." (PX-64.)

During August, however, Ford Credit's policy abruptly changed and it reached a decision to audit and reaudit Colonial Ford to dry up Colonial's float. (448, 501-02; PX-66, PX-67.) On August 26, 1974 Mr. Belnap was informed that Colonial was out-of-trust and would need $218,000.00 by September 1 to clean up its float. (PX-25.) This was the first time that Mr. Belnap had been informed that Colonial was floating or that additional working capital would be required by the dealership. (234-35.)

Pursuant to its plan, Ford Credit commenced to audit and reaudit Colonial to dry up its float and on September 10 when Colonial was unable to pay off a wholesale audit, Ford Credit suspended the wholesale line. (238, 502-03; PX-68.) When Mr. Belnap discovered that Colonial had been running overline and floating against Ford Credit, he negotiated a settlement with Mr. Pease under which Mr. Pease resigned from the dealership, and Mr. Belnap resumed control. (240-43, 304.) Even though Colonial now under Mr. Bel-

nap's active direction, was able to pay off the out-of-trust condition within two weeks by September 24, and was never out-of-trust again (239-40.). Ford Credit refused to restore Colonial's wholesale line. (239, 503.) Unable to finance the purchase of new cars Colonial's new car inventory shrank month by month and it sustained heavy losses. By August 1975 when the trial court entered a preliminary injunction after an evidentiary hearing, Colonial's new car inventory was down to 35 and it was virtually out of business. (245-46; PX-33.)

REASONS FOR DENYING THE WRIT

The evidence presented issues of facts for the jury, not questions of statutory significance for this Court. The evidence demonstrated Ford, through a continual course of coercive conduct, had deprived Colonial of the right to run its own business and to control critical aspects of its business including its management, facilities and financing. Ford did not attempt to justify its conduct. It denied engaging in that conduct, and the jury resolved the factual disputes against Ford.

Ford's claim of a conflict between the Tenth Circuit's decision and the "philosophy" of *Sylvania* is nonsense. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). *Sylvania* required a manufacturer's territorial resale restrictions be judged under the rule of reason. It did not immunize vertical restraints from antitrust scrutiny and it did not adopt a philosophy of "anything goes," including dealer independence, in the name of inter-brand competition. *Sylvania*, more im-

portantly, did not address ADDICA or the particular circumstances in the automobile industry that caused Congress to supplement the antitrust laws through the enactment of ADDICA.

Colonial did not claim and the Tenth Circuit did not hold ADDICA prohibited an automobile manufacturer from requiring adequate dealer representation both in facilities and management. On the contrary, the trial court gave and the Tenth Circuit approved an instruction holding an automobile manufacturer may "require" its dealers to adhere to reasonable standards in the areas of facilities and management. *Colonial Ford, Inc. v. Ford Motor Co.*, 577 F.2d 106, 110 (10th Cir. 1978).

Automobile manufacturers do depend upon their franchised dealers for market representation. Unquestionably, legitimate manufacturer concern with the quality of that representation is a significant perspective toward furthering competition between automobile manufacturers. But it is not the only component of competition in automotive marketing. What is good for General Motors is not necessarily good for its dealers or competition. Automobile manufacturers market their products through independent businessmen. The independence of automobile dealers in their key business decisions is a critical part of the competitive process.

Beyond question it was manufacturer domination and abuse of dealers' business independence that gave rise to the enactment of ADDICA. Congress in the legislative hearings leading to ADDICA found that

while dealers "were ostensively independent businessmen, the factory dominated and controlled almost every phase of their operations at all times. The conflict of interest between factory and dealer is a conflict between parties of totally unequal economic power." S. Rep. No. 2073, 84th Cong., 2d Sess. (1956). Congress, moreover, was alarmed at the heavy concentration of economic power in the big three automobile manufacturers, and recognized that intra-brand competition between independent dealers might provide the only remnant of effective competition in the industry. H. R. Rep. No. 2850, 84th Cong., 2d Sess. (1956). Congress' fundamental purpose in passing ADDICA was to redress the abuse and imbalance of economic power between manufacturer and dealer and protect the independence of automobile dealers. *Marquis v. Chrysler Corp.*, 577 F.2d 624 (9th Cir. 1978); *Shor-Line Rambler, Inc. v. American Motors Sales Corp.*, 1976-2 Trade Cas. ¶ 61,130 (7th Cir. 1976); *Randy's Studebaker Sales, Inc. v. Nissan Motor Corp.*, 533 F.2d 510 (10th Cir. 1976), *reh. denied; York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786 (5th Cir. 1971).

Ford, itself, recognized that ADDICA draws a line between the reasonable demands of a manufacturer and unwarranted interference with dealer independence. In an internal operating manual Ford stated ADDICA ". . . prohibits the company from coercing dealers to take any action or forbear any action that they have a right to decide for themselves." (PX-41 at 5.) The proper perspective of the questions presented by the evidence is whether Ford's conduct shreaded that standard.

1. *Colonial's forced relocation and construction of a new uneconomic facility by Ford constituted actionable coercion and cannot be fragmented from Ford's other coercive conduct.* Colonial's Ford franchises had an "adequate facility" provision. (PX-6, PX-8, PX-10.) Colonial, however, did not have any contractual commitment to relocate and construct a new facility. *Id.* Colonial's claim and proof was Ford forced Colonial as part of a continual course of coercive conduct, to relocate and construct a new uneconomic facility, the size and cost of which Ford determined without regard for Colonial's economic interest. Colonial's proof demonstrated (1) Ford forced Colonial's relocation, site selection and new facility requirements under the threat of franchise termination; (2) Ford rejected suitable and far less expensive sites; (3) Ford, without consulting Colonial, determined the size and cost of Colonial's facilities; (4) Ford contrary to its normal procedure did so without any feasibility analysis; (5) Ford at trial did not attempt to justify its new facility requirements, but merely falsely denied imposing such requirements; and (6) the new facilities Ford demanded adversely impacted Colonial's profitability and liquidity by increasing Colonial's facility cost in terms of new vehicle sales by over 150%.

One of Congress' specific concerns in enacting ADDICA was that automobile manufacturers were forcing dealers to build new and uneconomic facilities in disregard of the dealers' interest. Thus, the legislative history notes:

> One dealer attributed the death of his brother to the pressure of seeing his life savings swept down the drain by factory cancellation because of the dealer's refusal to change his location. He wanted to stay in the center of town rather than build a monument to the factory on the outskirts. . . . (Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess. 486-87 (1956).)

The three circuit cases cited by Ford are not in conflict with this legislative history or the Tenth Circuit's decision. *Woodard v. General Motors Corp.*, 298 F.2d 121 (5th Cir.), *cert. denied*, 369 U.S. 887 (1962); *Ed Houser Enterprises, Inc. v. General Motors Corp.*, 595 F.2d 366 (7th Cir. 1978); *Milos v. Ford Motor Co.*, 317 F.2d 712 (3d Cir.), *cert. denied*, 375 U.S. 896 (1963). In those cases there was no factual dispute. The dealers' facilities were inadequate. Other circuit decisions have held that a manufacturer's demand for a new and uneconomic facility constitutes coercion within ADDICA's prohibition. *Shor-Line Rambler, Inc. v. American Motors Sales Corp., supra; Accord, Randy's Studebaker Sales, Inc. v. Nissan Motor Corp., supra. Shor-Line*, just as the Tenth Circuit's decision, no more holds that ADDICA prohibits a manufacturer from requiring adequate dealership facilities than the three circuit cases cited by Ford hold ADDICA grants a manufacturer a license to impose any facility requirements it desires. The cited circuit decisions are entirely consistent. They properly fall on either side of the line drawn by ADDICA. Reasonable manufacturer requirements with regard to facilities are sustained. Unreasonable and oppressive facility demands in disregard

of a dealer's economic interest, on the other hand, demonstrate coercion. The Fifth Circuit has expressly accepted this synthesis in *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., supra.* In *York*, the Fifth Circuit pointed out with regard to the facility requirements of manufacturers:

> That certain specific conduct has been held not to constitute a violation of the Act in certain cases does not lead to the conclusion that such conduct would not violate the Act in the setting of another case.[8] The actions of the manufacturer must be considered under the circumstances arising in each particular case. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp.*, 447 F.2d 786, 793 (5th Cir. 1971).

Ford, moreover, improperly attempts to fragment Colonial's claim with regard to Ford's coercion. Ford attempts to separate Ford's conduct with regard to relocation from the entire course of Ford's dealings with Colonial. Ford's coercion with regard to Colonial's relocation cannot be practically separated from Ford's coercion with regard to Colonial's financing relationships with Ford Credit or Ford's coercion with regard to Ford's deprivation of Colonial's control over its dealership. Fragmentation of antitrust claims has been rejected by this Court, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962); Congress in ADDICA's legislative history made it clear, and the courts unanimously hold that coercion may be found in the entire course of dealings between manufacturer and dealer, and may be inferred from a continual course of conduct. *Marquis v. Chrysler Corp., supra; Shor-Line Rambler, Inc. v. American Motors*

Sales Corp., supra; York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., supra; American Motors Sales Corp. v. Semke, 384 F.2d 192 (10th Cir. 1967), *reh. denied;* H. R. Rep. No. 2850, 84th Cong., 2d Sess. 4603 (1956).

2. *Ford deprived Colonial of the right to control its own business in violation of Ford's policy and ADDICA.* Ford's effort to portray Ford's conduct with regard to the Pease-Belnap transactions as nothing more than an attempt to involve a "car man" in the management of the dealership is a fictional account of the evidence. Ford insisted as a condition of reinstating Colonial's franchise that Mr. Pease be given full and absolute control of the dealership. (181-82, 185, 188, 397-99, 402.) The written contract Ford forced Belnap to sign expressly placed Pease "in charge" of the dealership, and left Belnap without authority over Pease or the dealership. (PX-4.) Ford at trial never attempted to justify its participation in the Pease-Belnap transaction, but falsely denied having anything to do with that transaction. Ford's conduct, moreover, violated Ford's own policy. The highest Ford official to testify at trial was a Mr. Geoffrey C. Curran, Ford's director of marketing operations. Mr. Curran categorically testified:

> Q: Would it be contrary to Ford's policies, Mr. Curran, to condition the granting of a franchise or the renewal or continuation of a franchise . . . on the dealer relinquishing control and management of his own dealership?
>
> A: Very much contrary. (535.)

How can Ford now attempt to present a question to this Court based on a claim that its demands with regard to Colonial's management were reasonable when it categorically denied making any such demands at trial, and the demands that the evidence demonstrated it did make violated its own corporate policy?

An automobile manufacturer's claim that it has the right to determine who should control a dealership and compel the donation of a 49% interest in a dealership is manifestly inconsistent with the protection afforded by ADDICA, and the circuit courts have so held. *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corp., supra; Shor-Line Rambler, Inc. v. American Motors Sales Corp., supra; Marquis v. Chrysler Corp., supra.* The Tenth Circuit's concurrence in this line of authority does not warrant further review by this Court.

CONCLUSION

The questions Ford claims are presented are not presented by the evidence, and the petition for certiorari should be denied.

DATED this 8th day of August, 1979.

Respectfully submitted,

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